No. 88-2026

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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CLEMENT J. PACYNA, PETITIONER
MSG, U.S. Army, Retired

vs.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATTHEWS, in his capacity as Executive Secretary of the Board

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# BRIEF FOR THE PETITIONER

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CLEMENT J. PACYNA, Pro se
1151 Wehrle Drive
Williamsville, New York 14221
Telephone: (716) 632-4078

## QUESTION PRESENTED

Whether res judicata may lie to bar retired serviceman's instant suit, supported by substantial evidence, where: (1) a fatal jurisdictional defect exists in the first action on a monetary claim, rendering the court's judgment invalid or not a required valid final judgment upon which the second court relied; (2) the government in both the first and second action moved to dismiss suit on ground the court lacked jurisdiction; (3) the decisions of the courts below violate statutory and constitutional due process provisions and are in conflict with at least two opinions of the U.S. Supreme Court and federal circuit courts; and (4) case law holds that where a court lacks subject matter jurisdiction at the outset of a law suit, all judgments or orders, including appellate decisions are a nullity?

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## OPINIONS BELOW

The Judgment/Order of the Court of Appeals (App. A) and the Memorandum/Order of the district court (App. C) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on 10 February, 1989. The

timely petition for rehearing, with suggestion for rehearing en banc, was denied on 13 April, 1989 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. CONSTITUTION, Amend V provides:

> No person shall be denied due process of law.

2. CONSTITUTION, Amend XIV provides:

> No person shall be denied equal protection of law.

3. 28 U.S.C. §1346(a)(2) provides:

> The district courts shall have jurisdiction in any civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department or upon any express or implied contract with the United States.

§1346(d) provides:

> The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

4. 28 U.S.C. §1631 provides:

Transfer to cure want of jurisdiction in the interest of justice.

5. 28 U.S.C. §1361 provides:

District courts jurisdiction for actions in the nature of mandamus to compel an officer of the United States...to perform a duty owed to the plaintiff.

6. 5 U.S.C. §702 provides:

For "Right of Review" of an agency action on a non monetary claim, where its decision is wrong.

7. 10 U.S.C. §1552 provides:

District courts jurisdiction to review adverse decision by board for correction of military records which is made arbitrarily, capriciously or contrary to law.

PRELIMINARY STATEMENT

The jurisdictional defects in this case are so voluminous and serious and substantially prejudicial to petitioner as to require vacating all of the orders/judgments heretofore had herein and remand the case (see pg 33, par. 7) infra, even without resort to the requirements for vacature and remand based on the re-

mainder of the record herein. Therefore, the jurisdictional points are set forth for review prior to the factual and non-jurisdictional substantive aspects of the case.

## POINT I

### A SERIES OF JURISDICTIONAL DEFECTS EXISTS INFRINGING ON CONSTITUTIONAL DUE PROCESS RIGHTS

A series of jurisdictional defects exists in this matter, each of which individually mandates vacature of all of the orders/judgments heretofore had herein, infra, and which collectively are so severe as to create an infringement of constitutional rights and privileges if they are not vacated and the case is not remanded, infra.

## POINT II

### JURISDICTIONAL DEFECTS WERE NEVER DETERMINED

The court of appeals never made a determination that there was probable

cause to believe the instant district court did not act on the fact that the prior district court had no subject matter jurisdiction, as argued by the government, infra.

The court of appeals in its Order/Judgment (App. A) Ordered that the Judgment of the instant district court be and it hereby affirmed substantially for the reasons stated in the Memorandum/Order of Judge John T. Elfvin dated August 14, 1988 (App. C).

The instant timely filed suit on a non monetary claim for review of agency action, proven wrong on the face of the record, accrued in 1982, pursuant to 5 USC 702, 10 USC 1552 and 28 USC 1361, was presented but not litigated in the prior suit heretofore had herein.

In his Memorandum/Order, Judge Elfvin, supra, concluded that the defendants now move to dismiss the Complaint on the

grounds of the applicable statute of limitations, res judicata and lack of subject matter jurisdiction. He specifically Ordered that the defendants' motion to dismiss the Complaint is granted and the Complaint is dismissed with prejudice under the doctrine of res judicata.

The prior suit, in addition to the claim for review, supra, sought monetary damages for rejection of a promotion by the Army, accrued in 1952, for appointment to warrant officer and increase in petitioner's retirement pension, pursuant to 28 USC 1346. In his opinion of March 7, 1984 (App. D), Judge John T. Curtin, district court for the Western District of New York, concluded that petitioner's suit was barred by the six years statute of limitations under 28 USC 2401(a). He specifically held that:

"Although the government vigorously urges that the Court does not have jurisdiction under any theory, I find that there is jurisdiction under 28 USC 1346.

Plaintiff has waived his claim to any monetary award over $10,000.00."

POINT II

STATUTE CLEARLY VIOLATED

The first district court clearly had no jurisdiction under §1346 to bar suit on a monetary claim by the statue of limitations, for at least two (2) reasons, as follows:

(1) As aforementioned, under §1346(a)(2) district courts have jurisdiction in civil actions or claims against the United States, not exceeding $10,000 in amount, founded "upon any express or implied contract with the United States."

As petitioner was seeking money damages for denial by the Army of a promotion as warrant officer, a position to which he was not appointed or served, the district court clearly had no jurisdiction under §1346 because there was no required express or implied contract for such a position with the United States or Army. Fur-

ther, the district court's decision is in conflict with case authorities referred to in POINT V, below.

(2) As aforementioned, as petitioner sought inceases in his pension, therefore the district court had no jurisdiction under S1346(d). §1346(d) clearly states:

"The district courts shall not have jurisdiction under this section of any civil action or claim for a pension."

## POINT IV

## CONSTITUTIONAL DUE PROCESS RIGHTS VIOLATED

The first district court, in rendering a decision had no juridiction under §1346, supra. As aforementioned, the United States Constitution, Amendment V, provides in pertinent part:

"No person shall be deprived of life, liberty, or property without due process of law."

## POINT V

## DECISION OF THE FIRST DISTRICT COURT IS IN CONFLICT WITH PREVALENT CASE AUTHORITIES

The first district court opinion (App. D), claiming it had jurisdiction under §1346 barring suit by the six years statute of limitations on a claim seeking a position and monetary damages for a position to which Petitioner had never been appointed or served, is in conflict with prevalent case authorities. Cases in which opinions have a bearing on this case are:

United States v. Testan, 424 U.S. 392, 396, 402 (1976), in which the U.S. Supreme Court held:

"the respondents had not stated a claim upon which relief could be granted, for they were asking for positions, and pay, to which they had never been appointed. The dissent further argued that there is no constitutional right to a governmental position to which one has not been appointed; that the salary of a Government job is payable only to the person appointed to that position; and that the court has no authority to take over the appointing power that the Constitution, Art. II, §2, has placed in the Executive Department."

"The established rule is that one is not entitled to the benefit of a position

until he has been duly appointed to it. United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct. Cl. 183,186, 376 F.2d 900,902 (1967)."

Selman v. United States, 204 Ct. Cl. 675, 498 F.2d 1354 (1974), in which the Court held:

"It is true that a Government employee is normally entitled only to the salary of the grade to which he is appointed and serves. Urbina v. United States, 428 F.2d 1280, 1285; 192 Ct. Cl. 875,882 (1970); Price v. United States, 80 F.Supp. 542,543, 112 Ct. Cl. 198, 200 (1948); Brech v. Immigration & Naturalization Service, 362 F. Supp. 914, 917 (S.D.N.Y., 1973)."

United States v. Wickersham, 201 U.S. 390,392 (1906), in which the U.S. Supreme Court held:

"Where an officer has been prevented from performing the duities of his office he is entitled to his salary. Fitzsimmons v. Brooklyn, 102 N.Y. 536; Adams v. Justices, 21 Georgia, 206; Savage et al. v. Pickard, 82 Tennesee, 46."

Orloff v. Willoughby, 345 U.S. 83, 90 (1953), in which the U.S. Supreme Court held:

"The President commissions all Army officers. 5 U.S.C. 811. We have held that, except one holds his appointment

by virtue of a commission from the Predent, he is not an officer of the Army. United States v. Mouat, 124 U.S. 303. Congress has authorized the President alone to appoint Army officers in grades up to and including that of colonel, above which the advice and consent of the senate is required. 55 Stat. 728, as amended, 57 Stat. 380.

"It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilan or military positions."

POINT VI

LACK OF JURISDICTION RENDERS ALL ORDERS OR JUDGMENTS A NULLITY

Accordingly, the first district court barring suit on the statute of limitations over which it had no jurisdiction predicated on §1346, and the second district court barring suit by res judicata does not lie.

In Air Transport Assn v. PATCO, 516 F.Supp. 1108, Affirmed 667 F.2d 316, the Court cited:

"If a court lacks subject matter

jurisdiction at the outset of a lawsuit, all decrees, judgments, orders, etc., of that court and, for that matter, all appellate decisions in the action are a nullity (Federal Courts Key 542, Judgments Key 16)."

## POINT VII

### THE GOVERNMENT'S ACTION IN DEALING WITH THE JURISDICTIONAL ISSUE BORDERS ON THE IRRESPONSIBLE

In both the first and second district court actions, the government moved to dismiss petitioner's suit on grounds of lack of jurisdiction, aforementioned, but when the courts barred suit on jurisdiction and res judicata, favorable to it, respectively, the Government double shifted its position to one of silence/acceptance on the jurisdictional issue.

An opinion in Hurick v. Lehman, 782 F.2d 986, which has a bearing on this case, held:

"The government's action in dealing with the jurisdictional issue bordered on the irresponsible. The government's double shift of position on the issue betokens a casual approach to this important question that we cannot and do not condone."

STATEMENT

1. Petitioner is an Army master sergeant (pay grade E-7) who retired from active duty in 1962 after completing over 20 years of "outstanding" military service, both in combat and as a counter-intelligence agent (66-72).*

2. In August 1951, while a master sergeant and serving as a counter-intelligence agent in the Army, petitioner applied for a promotion to the position of warrant officer in the Counter-Intelligence Corps (CIC). His immediate superiors as well as a board of officers, first Army commanding general and the Army's surgeon general highly approved his appointment and physical qualifications, respectively (57-59).*

3. In a letter, dated 22 January 1952, petitioner was notified through Army channels that he had been selected for

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* Indicates page(s) of appendix to petitioner's brief to the Court of Appeals.

appointment by his First Army Headquarters and that his application was forwarded to The Adjutant General (TAG) in accordance with current directives. However, TAG informed that headquarters that petitioner's appointment was not favorably considered. Significantly, the letter or notification, the only document then in petitioner's possession prior to 1979 relative to the matter, failed to contain required, infra, reason(s) for the disapproval (App. E).

4. Immediately thereafter the denial in 1952, attempts to obtain the reasons for disapproval met with the Army's directive "you don't question higher authority" (56).*

5. On 13 June 1980 petitioner filed an application accompanied by 31 enclosures of substantial proof of evidence on the face of the record with the Army Board for Correction of Military Records (ABCMR), seeking reversal of the prior

determination, which denied him advancement to warrant officer status, back pay, etc., pursuant to Army Regulation (AR) 15-185 (29-38)* and under the provisions to recover on disability created by statute 10 USC 1552(a)&(b). §1552 provides for correction of military records from error or removal of an injustice, in the interest of substantial justice.

6. Petitioner's grievance, supported by substantial evidence, to the ABCMR was based on the Army's prevalent violations of its own regulations AR 600-148 (47-54)* supplementing AR 610-15 (39-46)*, and due process rights, briefly as follows:

a. In violation of AR 600-148, Section II par. 7e and Section III par. 9e, requiring notification of the reason (s) for disapproval, supra.

b. In violation of Constitutional rights, Amend. V and XIV, the Army denied due process to obtain the reason(s) for

disapproval, supra.

c. In violation of AR 600-148, Section II par. 5b(2), petitioner's application when ruled upon by CIC and TAG contained neither the required request for educational Waiver, with prerequisites nor his immediate commander's comment recommending approval or disapproval with the reasons therefore. The application was complete when initially filed and forwarded by First Army Headquarters to TAG, supra. The Army reported, indicating that the waiver and comment are the only documents not a matter of record (61-62).*

d. In violation of AR 600-148, Section II par. 7d, as petitioner's application, although not his fault, when ruled upon incomplete, was required to be returned to him for completion in compliance with said provisions.

7. Notwithstanding the substantial evidence proven on the face of the record,

supra, the ABCMR denied petitioner's application (73-74)*, request for reconsideration (75-82)* and vigorous appeal to the Secretary of the Army. The ABCMR's final decision on 20 July 1982 in part states substantially: that your vigorous dissent has been noted; that there is no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952; that the denial constituted final agency action; that petitioner was not barred from asking for reconsideration upon discovery of additional substantive evidence; and that petitioner has the right to institute action in a Federal Court (App. F ).

8. The ABCMR in a communication, dated 3 October 1980 addressed to The Judge Advocate General (TJAG), requested that appropriate corrective administrative action be taken upon a finding of legal

deficiency in the Department's denial of plaintiff's application for appointment of warrant officer in 1952 (28).* Nevertheless, TJAG reported that "no legal error was found" (84)*, despite the record it reviewed, inclusive of the violations and regulations had before it, supra.

FIRST COURT ACTION

9. As it was futile to further appeal to the ABCMR, petitioner commenced his first suit by attorney representation in the federal district court for the Western District of New York on 23 January 1983. As aforementioned, he sought an order appointing him to warrant officer, award of back pay to 1952 and increase in his retirement pension and review of the ABCMR's final decision in 1982. He alleged that the district court's jurisdiction on the monetary appointment claim was based on the Tucker Act, 28 USC 1346, and review of the ABCMR's final denial

was based on the mandamus statute 28 USC 1361 and 10 USC 1552.

10. In his opinion of March 7, 1984, Judge Curtin concluded that Plaintiff's claims accrued in 1952, at the latest, 1962, and therefore were time barred under 28 USC 2401(a). He held that although the government vigorously urges that the court does not have jurisdiction under any theory, he found that there was justification under §1346. Plaintiff had waived his claim to the monetary award over $10,000.00. (App. D).

11. Judge Curtin granted the government's motion for summary judgment and dismissed petitioner's complaint. Pacyna v. Marsh, No. Civ-83-205C, 617 F. Supp. 101 (W.D.N.Y., 1984).

12. The court of appeals for the second circuit affirmed the decision. Pacyna v. Marsh, No. 84-6200, 751 F.2d 374 (1985).

13. The U.S. Supreme Court granted petitioner's certiorari, vacating judgment and remanding case for the court of appeals to transfer the case pursuant to 28 USC 1631 to the court of appeals for the Federal Circuit (see 28 USC 1295(a)(2)). Pacyna v. Marsh, No. 84-1706, 106 S.Ct. 844 (1986).

14. The U.S. Court of Appeals for the Federal Circuit affirmed the decision of the district court (Judge Curtin). Pacyna v. Marsh, No. 86-1488, 809 F.2d 792(1986).

15. Petitioner's petition for a writ of certiorari was denied by the U.S. Supreme Court. Pacyna v. Marsh, No. 86-1136, 107 S.CT. 3278 (1987).

SECOND COURT ACTION

16. On 10 December 1987, petitioner instituted a second suit. Because he did not realize that there existed a fatal jurisdictional defect, etc. committed by the first district court, and that the

government acted irresponsible on the jurisdictional issue, supra, he commenced the instant suit pro se in the United States District Court, Western District of New York.

17. The instant suit soley sought judicial review of the ABCMR's final decision on 20 July 1982 on a non monetary claim for alleged agency wrong, pursuant to "Right of Review" under 5 USC 702, and the mandamus statute 28 USC 1361 and 10 USC 1552. Petitioner's ground for the suit was that his claim for "Right of Review" of a wrong by the agency's action had accrued in 1982, not 1952 or at the latest 1962, and that it was not subject to the statute of limitations, although it had been presented, but was not litigated in prior proceedings heretofore had herein.

18. In his opinion of 14 August 1988, Judge Elfvin specifically stated in part that a similar, if not identical, compla-

int was dismissed by John T. Curtin of this United States District Court on grounds that it was barred by the applicable six year statute of limitations for action against the United States. Pacyna v. Marsh, 617 F. Supp. 101 (W.D. N.Y., 1984), supra. That the defendants now move to dismiss the Complaint on the grounds of the applicable statute of limitations, res judicata and lack of subject matter jurisdiction. Judge Elfvin concluded that the Plaintiff's claim was barred by res judicata. Accordingly, he Ordered that the defendants' motion to dismiss the Complaint is granted and the Complaint is dismissed with prejudice. (App. C).

19. The court of appeals for the second circuit affirmed the decision. Pacyna v. Marsh, et al, No. 88-6230 on 10 February 1989 (App. A). Petition for rehearing en banc was denied on 13 April 1989 (App. B).

## ARGUMENT

### PRELIMINARY STATEMENT

From the very outset of the first and second federal district court suits, Appellant did not raise or consider the jurisdictional issue. He first raised the jurisdictional defect in his motion for rehearing en banc to the instant court of appeals, which denied his motion. Prior to Appellant's motion for rehearing en banc, his argument has always been that the courts have jurisdiction of his claim for review of the ABCMR or agency wrong accrued in 1982, which has not been litigated in prior proceedings heretofore had herein, infra, and which is not subject to the statute of limitations. Therefore, his claim is subject to review pursuant to §702, §1361 and §1552, and supported by numerous case authorities and constitutional provisions, supra, infra.

The grounds upon which granting certiorari is asked for are set forth in great detail in the opening preliminary statement, supra, and, concisely stated, are as follows:

1. As aforementioned, a series of jurisdictional defects exists in this case in violation of statute and infringing on constitutional Amendment V and XIV "due process" and "equal protection" rights.

The jurisdictional defect existing in the first action for monetary damages before Judge Curtin, who barred the claim by the statute of limitations and claimed to have jurisdiction under §1346, was never determined by the first court of appeals, which affirmed, supra. In the instant non monetary action for review of agency action, Judge Elfvin barred suit by res judicata, which was affirmed by the instant court of appeals, supra.

As the first district court or Judge

Curtin had no jurisdiction under §1346 to bar suit by the statute of limitations under §2401(a) where there clearly was no express or implied contract on a monetary claim with the United States, supra. Therefore, Judge Curtin's decision to bar suit is void, and his judgment is not a valid one. In addition, Judge Curtin did not have, nor no court has, the power to make an Army appointment nor jurisdiction over a claim for pension under §1346, as requested by petitioner, supra.

That the lack of subject matter jurisdiction at the outset of the law suit renders all prior or subsequent decrees, judgments, orders, etc. of that district court and for that matter, all appellate decisions in the action a nullity and of no effect, supra. Also see Ruddies v. Auburn, 261 F. Supp. 648.

2. That the Appellant's non monetary claim presented for judicial review of

the ABCMR's final decision accrued in July 1982, was not litigated in either the first or second suit.

The issue in this instant action, not resolved by this Court, is whether principles of res judicata may bar Appellant's district court action where the claim is on a question of law that there exists a fatal jurisdictional defect at the outset of the suit and that therefore there is no required valid final judgment on the merits in the case, supra.

Neither the first nor second district court based its decision on the full and fair opportunity test afforded by other courts on the same subject matter.

The basic elements of the doctrine of res judicata are stated in, but not limited to, case authorities, as follows:

a. Dore v. Kleppe, 522 F.2d 1369 (CA 5th Cir., 1976) held:

"Key to deciding whether res judicata applies is a determination of whether se-

cond suit involves the same cause of action as the prior litigation; if the cause of action is different in the second suit the parties are estopped from relitigating only those issues actually and necessarily decided in the first suit. Res judicata is a principle of public policy and should be applied as to give rather than deny justice."

b. International Harvester v. OSHRC, 628 F.2d 982 (CA 7th Cir., 1980) held:

"Action against company... was not barred by res judicata, since in both prior actions ... the issue was not litigated or decided on its merits."

c. Lee v. City of Peoria, 685 F.2d 196; Cerbone v. Westchester County, 508 F. Supp. 780; Aetna Life v. McCabe, 556 F. Supp. 1342; and Dunnhausen v. First Nat. Bank, 538 F. Supp. 551, held:

"Res judicata or estoppel principles do not apply where litigant did not have a full and fair opportunity to litigate relevant issue in earlier suit."

3. In the prior proceedings heretofore had herein, no federal district or appellate court made a determination whether the ABCMR's action was improper or not. The absent of such determination is in

conflict with prevalent case authorities in dealing with other veterans' cases on the same subject matter as res judicata. Such determinations were made in Blevins v. Orr, 721 F.2d 1419 (D.C. Cir., 1983); Tucker v. Department of the Army, 447 F. Supp. 1207 (D.C.D.C., 1978) affirmed 593 F.2d 1372, 193 U.S. App. D.C. 218; and Hardison v. Alexander, 655 F.2d 1281 (D.C. Cir., 1981) citing Dilley v. Alexander, 603 F.2d 914 (D.C. Cir., 1979).

In Dilley v. Alexander, supra, the court held:

> "As judge MacKinnon speaking for this court in Dilley, concluded:", "It is the duty of the federal courts to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious or contrary to the statutes and regulations governing that agency". "It is to this limited but critical inquiry that we now turn."

See non-veterans relitigation cases: Dore v. Kleppe and International Harvester v. OSHRC, supra, which reversed and remanded.

In Yee v. United States, 512 F.2d 1383 (1975), the court held:

"When a military correction board fails to correct an injustice clearly presented in the records before it, it is acting in violation of its mandate, and such violation, contrary to the evidence, is arbitrary and capricious."

4. Appellant's non monetary claim for judicial review of the ABCMR's final de-decision is not barred by the statute of limitations, pursuant to prevalent case authorities below.

In both the first and second suits:

"Where wrong for which Appellant sought judicial redress was not alleged error in his military record, which was committed, if at all, upon denial of promotion in 1952, or at the latest upon his retirement in 1962, but the alleged arbitrary and capricious deprivation of his rights, conferred by Act of Congress, 10 USC 1552, to an action "necessary to correct and error or remove an injustice", his suit was not barred by the statute of limitations when

filed in February 1983, after his June 13, 1980, application to correct records had been denied finally on 20 July 1982. See: Uhley v. United States, 121 F. Supp 674; Yagjian v. Marsh, Sec. of Army, 571 F. Supp. 698; Kaiser v. Sec. of Navy and Board for Correction of Naval Records, 52 F. Supp. 1226; Mulvaney v. Stetson, 470 F. Supp. 725; Ashe v. McNamara, 355 F.2d 277 (CA 1st Cir., 1965) and Nolen v. Schlesinger, Sec. of Defense, 492 F.2d 787 (CA 5h Cir., 1974), to name just a few of many such cases recorded in the l library, dating back 8, 38, 33, 24, 17 a 17 years, respectively. Also see Hamlin United States, 391 F.2d 941.

5. Other significant points raised in case authorities are:

Hahn v. United States, 757 F.2d 581 (CA 3rd Cir., 1985) cited:

"District court jurisdiction over suit for nonmonetary relief is not foreclosed by fact that it may be basis for award o damages against the United States. 28

USCA §1346, 1491."

Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967), reversed and remanded, held in pertinent part:

"the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 USC §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 USC §701(a). The Administrative Procedure Act provides specifically not only for review of "(a)gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court, " 5 USC §704."

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 228, 244 (1937), reversed, held:

"The allegations of the petition show that there is a controversy of a definite and substantial character." "It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

Williams v. Sec. of Navy, 787 F.2d 552 (Fed. Cir., 1986), held in pertinent part:

"The district court should not have dismissed Williams complaint on the merits,

but at the outset should have granted the government's motion to dismiss for failure to exhaust remedies available to him within the military."

With respect to holding in Williams above, the court of appeals for the federal circuit in the Appellant's within case, should have held that the district court or Judge Curtin should not have dismissed his Complaint on the non monetary merits, but at the outset should have granted the government's motion to dismiss for lack of subject matter jurisdiction on the monetary claim.

6. Because the jurisdictional issue is paramount here, a comparison is made between the cavalier manner in which the decisions below were made in this case with the inquiry made in great detail into the jurisdictional issue by the court in Van Drasek v. Lehman, Sec. of Navy, 762 F.2d 1065 (CA D.C. Cir., 1985), which held in part:

"As explained in greater detail below,

for a claim in the district court to be based on the Tucker Act, it must (1) seek money (2) not exceeding $10,000 (3) from the United States and (4) be founded either upon a contract or upon a provision of "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. §1346(a)(2), that can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." "United States v. Mitchell, 463 L.Ed2d 580 (1983). If any of these requirements are not met, the claim falls outside the scope of the Tucker Act, and this court would retain appellate jurisdiction over the entire case."

In Appellant's within case, the monetary claim falls outside the Tucker Act because under §1346 he cannot sue for a position not had, nor for a pension, nor did the district court have the power to promote him to warrant officer, supra.

7. For the foregoing reasons, in the interest of substantive justice, this Court should in this within case, ORDER:

a. The district court or Judge Curtin's Order/Judgment, No. Civ-83-205C, 617 F.Supp. 101 (W.D.N.Y., 1984) vacated in part on the monetary claim and remanded on the non monetary claim for agency

review.

b. The court of appeals for the second circuit of New York's Order/Judgment No. 84-6200, 751 F.2d 374 (1985), vacated

c. The U.S. Supreme Court's Order/Judgment, No. 84-1706, 106 S.Ct. 844 (1986), vacating and transferring case to the court of appeals for the federal circuit, vacated.

d. The court of appeals for the Federal Circuit's Order/Judgment, No. 86-1488, 809 F.2d 792 (1986), vacated.

e. The U.S. Supreme Court's Order/Judgment denying certiorari, No. 86-1136, 107 S.Ct. 3278 (1987), vacated.

f. The district court or Judge Elfvin's Order/Judgment, No. Civ-87-1531E (1988), unreported, vacated.

g. The court of appeals for the second circuit of New York's Order/Judgment, No. 88-6230 (1989), unreported, vacated.

h. or, in the alternative to par. a. above, with respect to remand to the district court, remand the case to the ABCM R, with instructions, because the case is permeated with prevalent court tainted and government irresponsible actions since 1983 and Army violations of its own regulations since 1952, supra, all of which are adverse to Appellant.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CLEMENT J. PACYNA, Pro se
MSG, U.S. Army, Retired
1151 Wehrle Drive
Williamsville, New York 14221
Telephone: (716) 632-4078

June 1989.

# APPENDICES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of February, one thousand nine hundred and eighty-nine.

Present: Honorable J. Edward Lumbard,
Honorable Amalya L. Kearse,
Honorable Ralph K. Winter,
Circuit Judges.

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CLEMENT J. PACYNA,
MSG, U.S. Army Retired
Plaintiff-Appellant

v.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATTHEWS, in his capacity as Executive Secretary of the Board,
Defendants-Appellees.

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Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States

District Court for the Western District of New York, and was submitted by Plaintiff pro se and by counsel for defendants.

ON CONSIDERATION WHEREFORE, it is hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby affirmed substantially for the reasons stated in the Memorandum and Order of Judge John T. Elfvin dated August 14, 1988.

/s/J. EDWARD LUMBARD
J. Edward Lumbard, U.S.C.J.

/s/AMALYA L. KEARSE
AMALYA L. KEARSE, U.S.C.J.

/s/RALPH K. WINTER
RALPH K. WINTER, U.S.C.J.

Filed FEB 10 1989

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of April, one thousand nine hundred and eighty-nine.

FILED April 13, 1989

CLEMENT J. PACYNA,
MSG, U.S. Army retired,
Plaintiff-Appellant,

v.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATTHEWS, in his capacity as Executive Secretary of the Board.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, CLEMENT J. PACYNA, pro se.

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is denied.

It is further noted that the suggestion

for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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CLEMENT J. PACYNA,
MSG, U.S. Army Retired,
Plaintiff,

v.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATHHEWS, in his capacity as Executive Secretary of the Board,
Defendants.

MEMORANDUM DECISION
CIV-87-1531E

This is an action seeking judicial review of a final decision of the Army Board for Correction of Military Records ("the Board"). The plaintiff, acting pro se asks this Court to correct his military records to reflect his appointment to Warrant Officer in the United States Army which appointment was denied by the Army in 1952. The defendants now move to dismiss the Complaint on the grounds of the applicable statute of limitations, res judicata and lack of subject matter jurisdiction.

A similar, if not identical, Complaint

was dismissed by Judge John T. Curtin of this United States District Court on the grounds that it was barred by the applicable six-year statute of limitations for action against the United States.[1] Pacyna v. Marsh, 617 F.Supp. 101, 102 (W.D.N.Y., 1984). In that action the plaintiff had named only Secretary of the Army John O. Marsh, Jr. as a defendant and had sought to have his records corrected to reflect his appointment to Warrant Officer and also that his retirement pay be increased to reflect such appointment. Complaint, Pacyna v. Marsh, supra (Civ. No. 83-205C), Exhibit A to Donald P. Simet, Esq. Affidavit (sworn to February 5, 1988). Judge Curtin held that the cause of action had accrued in 1952 when the plaintiff's application for promotion had been denied and

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1. 28 U.S.C. §2401(a) provides that "Every civil action commenced against the United States shall be barred unless the Complaint is filed within six years after the right of action first accrues."

that his action therefore was barred by the six-year statute of limitations.[2]

Judge Curtin was underwhelmed by the plaintiff's contention -- the same contention as is made here -- that the right of action did not accrue until 1982 when his records were denied, and held that the plaintiff could not revive his claim by applying to the Board in 1981 and 1982 and contending that its current adverse decision created anew his cause of action. Pacyna v. Marsh, supra, at 103. Accordingly, the defendant Marsh's motion for summary judgment dismissing the Complaint was granted by Judge Curtin. This decision was affirmed by the United States Court of Appeals for the Federal Circuit. Pacyna v. Marsh, 809 F.2d 792 (1986). cert denied,

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2. Judge Curtin found that, even if the statute of limitations had been tolled while the plaintiff was on active duty pursuant to the Soldiers and Sailor's Civil Relief Act of 1940, 50 U.S.C. App. §501 et seq., his claim would have accrued upon his retirement in 1962. Pacyna v. Marsh, supra, at 102.

___U.S.___, 107 S.Ct. 2177, reh-g denied, ___U.S.___, 107 S.Ct. 3278 (1987); Exhibit D to Simet Affidavit.[3]

The plaintiff maintains that the instant action is not barred by the doctrine of res judicata inasmuch as it is soley an action for review of the new decision by the Board, whereas his earlier action was one for monetary damages. This contention is wholly without merit. Both actions request the same relief -- viz., the correction of his military records to reflect an appointment to the rank of Warrant Officer. The factual allegations in both complaints are vitually identical; it appears that the plaintiff copied the in-

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3. The United States Court of Appeals for Federal Circuit held that the cause of action had accrued in 1952 and that the plaintiff's contention that the Court must review the Board's 1981 and 1982 decisions concerning a matter that accrued 31 years before this action was commenced was contrary to law. Copy of Unpublished Opinion, Pacyna v. Marsh, 809 F.2d 792 (1986) (per curiam), Exhibit D to Simet Affidavit.

stant complaint from the previous one which had been prepared by an attorney. The only distinctions are the way the claim for relief is phrased and the addition of another defendant. These distinctions do not change the fact that the plaintiff is again attempting to get judicial review of the same old decision by the United States Army.

The doctrine of res judicata is well established and its basic principles are familiar. "(A) valid, final judgment on the merits bars a second action by the same plaintiff or his privy against the same defendant or his privy, on the same cause of action***." 1B J. Moore, J.D. Lucas & T. Currier, Moore's Federal Practice 10.411(2), p. 396 (2d ed 1984); see also N.L.R.B. v. United Technologies Corp., 706 F.2d 1254, 1259 (2d Cir. 1983). An earlier judgment precludes subsequent litigation of issues actually decided in the

first action and of issues that could have been raised therein but were not, ibid.; Browning Debenture Holders' Com. v. DASA Corp., 605 F.2d 35,39 (2d Cir. 1978), as long as the two actions arise from the same transaction or series of transactions. See Isaac v. Schwartz, 706 F.2d 15, 17 (1st Cir. 1983).

Minor semantic distinctions can not allow the plaintiff to escape the doctrine of res judicata. The fact that the plaintiff named an additional defendant -- i. e., John W. Matthews -- does not save the Complaint. "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402,403 (1940).

The plaintiff asks this Court to allow

him to do that what was earlier held he could not do -- i.e. obtain judicial review of a decision that was made 36 years ago.

Accordingly, it is hereby ORDERED that the defendants' motion to dismiss the Complaint is granted and the Complaint is dismissed with prejudice.

Dated: Buffalo, N.Y.
August 14, 1988

/s/ JOHN T. ELFVIN
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MEMORANDUM DECISION
CIV-83-205C

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CLEMENT J. PACYNA,

Plaintiff

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

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In this case, plaintiff seeks review of a final decision of the Secretary of the Army. Defendant moves to dismiss on the ground that plaintiff has failed to state a claim and, in the alternative, for summary judgment. The basis for these motions is lack of jurisdiction, statute of limitations, and laches.

The history of this litigation is a long one. It began in 1951, when plaintiff was serving as a master sergeant and applied for an appointment as a warrant officer in the Counter-intelligence Corps (CIC). Although he received approval from his local

commanders, on January 3 (sic), 1952, he was informed that his application did not receive final approval.

Plaintiff continued in military service until 1962, when he retired from the Army with the status of "retired reserve." Nothing occurred after that until February of 1979, when plaintiff made an application through the Freedom of Information Act and examined his personnel file.

On June 13, 1980, plaintiff filed an application with the Army Board for Correction of Military Records (ABCMR), seeking to have his 1952 promotion denial reversed and his records corrected accordingly. Plaintiff claims that his application was timely because it was filed within three years after he discovered the error in his record. In the fall of 1980, the ABCMR solicited and obtained an advisory opinion from the Office of the Judge Advocate General. A copy of the opinion, which re-

commended that plaintiff's claim be denied, was sent to him for his comment. Plaintiff responded in February of 1981.

After considering plaintiff's response, the Board concluded that plaintiff had not given any reason to explain why the action not to appoint him was illegal or in violation of regulations. The Board also held that his failure to timely file his application had made efforts by the Army to investigate his claim difficult. Because of his 28-year delay in challenging the decision made in 1952, only limited documentation is available. This decision was affirmed by the Secretary of the Army on June 7, 1982. Plaintiff's suit followed in February, 1983, with plaintiff claiming that failure to appoint him as a warrant officer was an abuse of discretion and a violation of his rights. He seeks an order of the court appointing him to the rank of warrant officer and retirement pay, including back

payment to the time of the initial denial.

Assuming for the moment that this court has jurisdiction, it is clear that plaintiff's claim is barred by the statute of limitations. 28 U.S.C. §2401(a) provides that a civil suit against the United States must be commenced within six years after the right of action first accrues. The statute may not be waived in actions against the United States. United States v. Kubrick, 444 U.S. 111 (1979). "(A) cause of action is deemed to have accrued when facts exist which enable one party to maintain an action against another." Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), quoting Great American Ins. Co. v. Louis Lesser Enterprises, Inc. 353 F.2d 997, 1001 (8th Cir. 1965).

The file in this case was complete in 1952, when plaintiff's application for promotion was rejected. Plaintiff argues that he was not able to obtain the facts

until he looked at his personnel file through a Freedom of Information Act Procedure in 1979, but there was no reason why he could not have reviewed his personnel records at an earlier date. Even if the statute of limitations was tolled during the period plaintiff remained on active duty, pursuant to the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S. C. App. §501 et seq., his cause of action would have accrued upon his retirement in 1962.

Cases such as Kaiser v. Secretary of the Navy, 525 F.Supp 1226 (D. Col. 1981), cited by Plaintiff in support of his application, do not apply here. The statute of limitations did not apply in Kaiser, because the nature of the relief sought in that case was to correct a discharge from dishonorable to honorable. In that type of case, or cases in which the applicant seeks to expunge the judgment of a court martial,

the statute of limitations is not a bar. However, in cases like the present one where the relief sought is money, the statute of limitations is a bar if the case is untimely filed. In this case, the plaintiff wants his records corrected and, at the same time, he wants the government to increase his retirement pay.

Plaintiff cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute. To do this would permit a plaintiff to have the power to avoid the jurisdictional bar every time he submitted an application which was considered by the Board. Thus, whether his claim accrued in 1952 or at the time of his retirement in 1962, the time to institute the suit has long passed.

Although the government vigorously urges that the court does not have jurisdiction under any theory, I find that there is

jurisdiction under 28 U.S.C. §1346. Plaintiff has waived his claim to any monetary award over $10,000.00.

Defendant's motion for summary judgment is granted, and the complaint is dismissed.

So ordered.

/S/ JOHN T. CURTIN
USDJ

Dated: March 7, 1984.

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HEADQUARTERS FIRST ARMY
GOVERNORS ISLAND, NEW YORK 4, N.Y.

AHFAG-MP 201 Pacyna,Clement J. 22 JAN 1952

SUBJECT: Temporary Appointment as Warrant Officer

THRU: Commanding Officer
108th CIC Detachment
Boston Army Base
Boston, Massachusetts

TO: M/Sgt Clement J. Pacyna, RA20275571

1. Your application for temporary appointment as warrant officer was received at this headquarters and you were tentatively selected for appointment. Your application was forwarded to The Adjutant General in accordance with current directives.

2. The Adjutant General has informed this headquarters that your appointment as warrant officer, junior grade, Army of the United States in Counter-intelligence career warrant is not favorably considered.

BY COMMAND OF

LIEUTENANT GENERAL CRITTENBERGER:

/S/JEROME L. BAES
JEROME L. BAES
1st Lieut, AGC
Asst Adj Gen

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310
20 Jul 1982

SFMR

Mr. Timothy R. Lovallo, Esq.
950 Ellicott Square Building
Buffalo, New York 14203

Dear Mr. Lovallo:

This is in reply to your letter of 7 July 1982 to the Deputy Assistant Secretary concerning the case of Master Sergeant Clement J. Pacyna, 106-05-7846, United States Army Retired.

Your vigorous dissent has been noted. However, all evidence currently of record clearly indicates that there was no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952.

Please be advised that within the Department of Defense, the authority to effect the change you seek in Sergeant Pacyna's records can be exercised only through the

Board for Correction of Military Records. Accordingly, there is no higher administrative appeal within the Department of Defense.

Should you discover additional substantive evidence not previously submitted, you may ask for reconsideration of Sergeant Pacyna's case. Otherwise this letter constitutes final agency action on his request for correction of military records. However, if you desire additional review of the Board's actions, then you have the right to institute action in a Federal court of competent jurisdiction.

Sincerely,

/s/JOHN W. MATTHEWS
JOHN W. MATTHEWS
Executive Secretary
Board for Correction
of Military Records